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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. _____

NISSAN MOTOR CORPORATION IN U.S.A., PETITIONER,

vs.

JAMES W. SANDERSON, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Nissan Motor Corporation in U.S.A. (hereinafter "Nissan-U.S.A.") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 26, 1974, granting a writ of mandamus directed to a judge of the United States District Court for the District of Colorado.[1]

OPINION BELOW

The opinion of the court of appeals, not yet reported, is included as Appendix A hereto. No opinion was rendered by the district court. Transcripts of two hearings before the district court on the subject discovery motions and the district court's oral rulings thereon are included as Appendices B and C.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1974. (App. A). This Petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

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[1] The Honorable Fred M. Winner, United States District Judge, was the respondent named in the court of appeals proceeding. Nissan-U.S.A. was a co-respondent.

QUESTIONS PRESENTED

A. Whether a class plaintiff, even though obligated to finance his own lawsuit, can avoid discovery as to his ability and willingness to do so.

B. Issues implicit in that fundamental question are:

1. Whether a court of appeals may bar a class action defendant from obtaining discovery as to the representative plaintiff's ability fairly and adequately to protect the interests of the class.

2. Whether a court of appeals on application for mandamus may hold the trial court guilty of a "usurpation of power" based on the district court's determination that (a) the plaintiff's ability and willingness to pay the notice and other costs of his class action, and (b) agreements between the plaintiff and his attorneys or any other persons respecting payment of such costs, are relevant to the adequacy of representation question.[2]

3. Whether the court of appeals has deprived Nissan-U.S.A. of due process of law by prohibiting discovery relating to plaintiff's ability to pay the cost of notice and other costs of his class action, thereby depriving Nissan-U.S.A. of its right to defend effectively against a material and important allegation in the complaint.

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[2] This Petition seeks review of the Tenth Circuit's order that a writ of mandamus issue directing the district court to vacate certain discovery orders. (App. A). A writ of mandamus is appropriately issued only when there is a judicial "usurpation of power" or clear abuse of discretion by the trial court. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-83 (1953). The Tenth Circuit's mandamus order should be judged according to that exacting standard by this Court. Moreover, the scope of review which should be followed by courts of appeals is even more limited when considering discovery matters, which are uniquely within the province of the trial courts. *E.g.*, American Express Warehousing, Ltd. v. Transamerica Insurance Co., 380 F.2d 277, 284 (2d Cir. 1967).

STATEMENT OF THE CASE

On April 18, 1974, plaintiff James W. Sanderson filed this class action on behalf of himself and all other persons who purchased a new Datsun motor vehicle at retail from a Colorado Datsun dealer during a period beginning sometime prior to 1966 and continuing at least until February 26, 1973.[3] The complaint alleges violations of Section 1 of the Sherman Act against defendants Nissan-U.S.A., its Japanese parent corporation, and various Colorado Datsun dealers. The jurisdiction of the district court was invoked pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15. Pursuant to Rule 23(a)(4) of the Federal Rules of Civil Procedure plaintiff also alleged that he will fairly and adequately protect the interests of the class. In its answer Nissan-U.S.A. denied that averment.

On June 1, 1974, Nissan-U.S.A. served plaintiff with a notice to take his deposition, including a request that he produce the following documents:

> "2. Current financial statements, income tax returns for the years 1972 and 1973, and any other writings or documents reflecting plaintiffs' ability to finance the expenses that may be involved in this purported class action litigation.
>
> 3. Any agreements plaintiffs have made, collectively or individually, among themselves, with their attorneys of record herein and with any other persons, pertaining to (a) the financing of the costs of this litigation and (b) the payment of attorneys' fees that might be incurred. Such documents should include, in addition to express written agreements, correspondence and any and all other writings or records reflecting any oral agreements that may have been made or understandings that may have been reached."

[3] The complaint named two additional plaintiffs. Both have been dismissed by the district court on their own motion and are no longer parties to this proceeding.

On June 24, 1974, plaintiff filed a response to the deposition notice in which he objected to the production of these documents on the grounds of relevance and, with respect to agreements between plaintiff and his attorneys, attorney-client privilege. Later on June 24, 1974, Nissan-U.S.A. filed a motion to compel production of the documents.

On June 25, 1974, a hearing with respect to these discovery motions was held before the Honorable Fred M. Winner, United States District Judge. At its conclusion the district court held that the requested discovery was proper because (1) it was relevant to the class action determination, primarily plaintiff's ability to adequately represent the class; and (2) the requested discovery did not inquire as to privileged attorney-client communications. (App. B, pp. B-4-B-8).[4] The district court declined to certify its discovery order for an interlocutory appeal, but on plaintiff's representation that he would seek appellate review by way of a petition for writs of mandamus and prohibition, the district court stayed the requested discovery pending such review. (App. C, pp. C-4-C-5). The trial court also ordered that plaintiff appear for his deposition, but that Nissan-U.S.A. refrain from asking questions concerning the subjects covered by the requested documents as to which discovery had been stayed. (App. C, p. C-8).

Plaintiff's deposition was taken on June 26, 1974. He testified, among other things, that he was only willing to commit $2,000 to the case at that time. (Sanderson Deposition, pp. 78-81).[5] He testified that his attorney had esti-

[4] Petitioner herein does not seek review of the decision of the Tenth Circuit insofar as it relates to agreements concerning attorneys' fees. Although review is sought of the Tenth Circuit's decision prohibiting discovery as to agreements between plaintiff and his attorneys respecting the payment of the expenses of the suit, no privilege question was decided by the Tenth Circuit, and only the relevance issues are raised in this Petition. *See* n. 16 *infra*.

[5] In an affidavit attached as an appendix to the plaintiff's Petition for Writs of Mandamus and Prohibition, he stated: "I am willing at the present time to bear the cost of notice to the class, up to, but not exceeding, the total aggregate sum of $4,000."

mated that the class would contain 7,000 to 10,000 people, and that the costs of the suit would be from $2,000 to $4,000. (Sanderson Deposition, pp. 73, 78.)[6] No discovery was had as to plaintiff's ability to pay the costs of his class action or agreements or arrangements between plaintiff and his attorneys or other persons respecting the payment of such costs.

The district court hearings and partial deposition of the plaintiff took place prior to any determination by the district court as to whether or not the suit could be maintained as a class action. There has been no such determination to date, and Nissan-U.S.A. still desires to conduct such discovery before the trial court considers the class certification question.

Plaintiff filed a petition for writs of mandamus and prohibition on August 14, 1974. Nissan-U.S.A. answered that petition, opposing issuance of the writs. On November 26, 1974, the court of appeals ordered that a writ of mandamus issue to Judge Winner requiring that he vacate his discovery order of June 25, 1974. (App. A).

REASONS FOR GRANTING THE WRIT

Federal district courts wrestle daily with problems relating to certification and management of class actions. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), resolved some of these difficulties. However, it gave rise to at least one substantial new one which will give trial courts and class defendants recurring headaches unless they receive guidance from this Court: can a class plaintiff, even though obligated to finance his lawsuit, avoid discovery as to his ability and willingness to do so?

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[6] In an affidavit attached as an appendix to Nissan-U.S.A.'s Answer to the Petition for Writs of Mandamus and Prohibition, Nissan-U.S.A.'s Denver Regional Sales Manager stated that the records of Nissan-U.S.A. showed that the number of Datsun motor vehicles sold at retail by Colorado Datsun dealers during the approximate period in controversy exceeded 25,000 vehicles.

The decision of the Tenth Circuit holds that he can, and thereby raises questions of enormous importance in the area of federal procedure. The decision of the Tenth Circuit misapplies and conflicts in principle with *Eisen*. It conflicts in principle with decisions in other circuits and numerous district courts. Additionally, and of equal importance, it bars discovery by a defendant clearly relevant to a material allegation of the complaint and thereby deprives that defendant of the fundamental due process right to defend.

I. THE DECISION OF THE TENTH CIRCUIT MISAPPLIES AND CONFLICTS IN PRINCIPLE WITH *EISEN*.

A. In *Eisen* this Court held:

> "We also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class.
>
> . . . .
>
> "Where, as here, the relationship between the parties is truly adversary, *the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.*" 417 U.S. at 177-79 (emphasis added).

The Court also held:

> "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176.

Surely that is also true with respect to the requirement of Rule 23(a)(4) that the plaintiff "*will* fairly and adequately protect the interests of the class." (emphasis added). If the plaintiff cannot, or will not, shoulder the financial burden of the class action, he cannot adequately represent the class. Nissan-U.S.A. wants to discover, prior to class determination, whether plaintiff Sanderson can or cannot.

The trial court agrees. But the Tenth Circuit has barred that discovery.

If the decision of the Tenth Circuit is allowed to stand, a plaintiff who cannot finance his own lawsuit can readily make a sham of the *Eisen* holding that he is required to do so. A class plaintiff could launch a substantial class action on a shoestring or on credit provided by his attorneys.[7] Admittedly, it is possible in antitrust litigation that an advantageous settlement or successful trial and appeal could result in a fund from which plaintiff's creditors could be paid. But the defendant may not settle and the plaintiff may not win.[8] Does the plaintiff avoid his *Eisen* obligation by abandoning the case, and the class, in midstream, or by pleading bankruptcy? Perhaps he has been advised by his attorneys that this just would not happen, or that they would cover his losses if worse came to worst. But the attorneys cannot pay the bill. Canon 5, Disciplinary Rule 5-103(B), A.B.A. and Colorado CODES OF PROFESSIONAL RESPONSIBILITY.

These possibilities are not fanciful. Although one would think that persons with small individual claims would not commence a large class action where the potential expenses

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[7] In plaintiff's Petition for Writs of Mandamus and Prohibition it was implied that his attorneys were advancing the expenses of litigation. Plaintiff refused to disclose specifics but asserted that any expense advances would be made pursuant to Canon 5, Disciplinary Rule 5-103(B) of the A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY. (Petition for Writs of Mandamus and Prohibition, p. 13). This, of course, is no answer. Under the Code the plaintiff, not his counsel, must be ultimately liable.

[8] A statistical study of class actions in the District of Columbia contained in the "Class Action Study" by the Staff of the Senate Commerce Committee (GPO June, 1974, reprinted at 670 BNA ANTITRUST & TRADE REGULATION REPORT, July 2, 1974, pp. G-1 *et seq.*) indicated that relief for the class—either by settlement or judgment—was obtained in only 27% of the class actions filed between 1966 and 1972 which had reached disposition. (p. G-3). A very limited national sampling indicated class monetary relief in only 49% of the class actions surveyed. (p. G-8).

far outstrip any possible recovery,[9] in actuality the temptation to proceed as here with a class of great size is manifest. Large class actions unquestionably have an *in terrorem* quality which may induce settlements irrespective of the merits of the claim.[10]

After *Eisen*, these questions will arise every time a sizeable Rule 23(b)(3) class action is filed on behalf of claimants with small individual claims. As in this case, and others cited herein, defendants and trial judges will want to learn prior to certification whether the plaintiff is proceeding on a solid financial base. Thus, the discovery questions presented by this Petition can be expected to continue to recur regularly in the district courts and should be settled by this Court.

The Tenth Circuit viewed the trial court's discovery orders as an extension of *Eisen* which "would limit and curtail Rule 23 in a manner never contemplated." (App. A, p. A-4). We respectfully urge that the opposite is true. The trial court's order is completely consistent with *Eisen*, and the decision of the court of appeals conflicts with the principles enunciated in *Eisen*. Those principles are that a class plaintiff must pay the costs of his suit including notice costs. Judge Winner ordered discovery with respect to the financial ability and willingness of the plaintiff to

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[9] In the present case, for example, plaintiff has estimated the monetary recovery if plaintiff is successful on the merits at $600 ($200 trebled) per car. Petition for Writs of Mandamus and Prohibition at 16, n. 5. This is nothing but an estimate and the recovery, if any, may be far less or even negligible.

[10] *See* Kline v. Coldwell, Banker & Co., Realtors, Civil No. 73-2169 (9th Cir., Dec. 20, 1974) (Duniway, J., concurring); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974).

finance his lawsuit.[11] Notwithstanding that pre-trial discovery is peculiarly within the province of the district court, the court of appeals barred discovery as to financial ability.

The court of appeals expressed a limited agreement with this Court's ruling in *Eisen* when it said that it agreed fully that due process requires decent notice. It also acknowledged that the trial court should be satisfied that the representative plaintiff should be able to pay notice costs. (App. A, p. A-5). Even this limited recognition of the principles of this Court's *Eisen* decision was, as we believe the opinion reflects, most reluctantly given. From that point forward the Tenth Circuit predicated its departure from *Eisen* on its statement that it eschewed the question of whether litigants are rich or poor. (App. A, p. A-5). That is not the point at issue. The federal courts are and must be open to all. But all must follow the same rules. Rule 23 clearly permits the banding together of numbers of persons with small claims and of small means. By so doing and by pooling their resources before filing suit they can ethically and financially and adequately represent even larger numbers in a consumer class action such as the instant case. But if a class plaintiff of modest means starts a suit all by himself without making adequate provision for financing his lawsuit, he is not an adequate representative of the mass of persons for whom he purports to act.

The enormous burdens of a class plaintiff and the procedure that such representative should follow in meeting these burdens were well expressed in *Ralston v. Volks-*

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[11] In a response filed February 3, 1975, to interrogatories, plaintiff again repeated his willingness at the present time to "bear the cost of notice" up to but not exceeding $4,000. However, plaintiff refused to state whether he was willing to finance any expenses other than notice, citing the decision of the Tenth Circuit. In short, plaintiff objects to inquiry as to his *ability* to finance any of the expenses, and as to his *willingness* to finance any expenses other than notice.

wagenwerk, A. G., 61 F.R.D. 427 (W.D. Mo. 1973).[12] The court there stated:

> "The interests of the class go far beyond mere determination of whether they should or should not be members of the class and whether they can be properly apprised of the pendency of this lawsuit. In order adequately and fairly to represent the interests of the class, the named plaintiffs must sustain the burden of showing that their resources are adequate to pursue this lawsuit to completion, even in the absence of any additional financial contributions from members of the purported class.
>
> . . . .
>
> "Developing evidence on the merits of the action will be expensive. . . . I find that the probable expense of developing acceptable evidence necessary to present the merits of the case would exceed substantially the amount the named plaintiffs have at their disposal.
>
> "Seeking to represent a large group of people as a class representative in a lawsuit is a very heavy responsibility. It should never be undertaken lightly, and the court should allow such representation only upon a firm foundation that the named plaintiffs are willing and financially able to shoulder that burden. Such a lawsuit should never be undertaken in the hope that at some future date the existence of a class will aid the plaintiffs in carrying the case to completion, because nobody knows whether other unidentified members of the class are able or willing to finance the action. Inadequate

[12]The Tenth Circuit erroneously put *Ralston* into the category of a class suit with an enormous class like *Eisen*. While the original complaint in *Ralston* may have alleged a nationwide class, during the course of the litigation the size of the class was modified downward to a number of about 18,000 persons, and that is the size class dealt with by the trial judge in his opinion. By comparison, the class in the instant case, as defined by plaintiff, may approach 25,000 persons. *See* n. 6 *supra*.

financing threatens the procedural and substantive interests of all members of the class.

"All of this is not to say that large numbers of persons should not coalesce their finances in supporting a class action. But the pooling should be made before the suit is filed, thereby assuring sufficient resources, rather than relying upon court processes to coagulate a class who may be willing and able to underwrite the action." 61 F.R.D. at 433-34.

We submit that the view of the trial court in *Ralston* is realistic and correct under Rule 23, and entirely consistent with *Eisen*. Small claimants can band together, pool their resources and represent a large class. But whoever undertakes such a suit, one or more, rich or poor, must play by the same rules. The class plaintiff, or plaintiffs if more than one, must allege that they will adequately represent the class, and must assume the burden of showing willingness and ability to finance the lawsuit. That subject is in issue, and the defendant is entitled to conduct broad discovery in respect thereto.

B. It appears that the court of appeals attempted to distinguish *Eisen* and two district court cases from the instant case on the basis that they involved huge classes. (App. A, pp. A-5-A-6).[13] Rule 23 makes no such distinction and that rule is not, and as demonstrated above does not need to be, tailored to the pocketbooks of particular plaintiffs.

The Tenth Circuit announced that here there is no "legitimate concern" about plaintiff's ability to pursue this class action, noting too that plaintiff's annual income ($22,744 as a GS-13 government employee) was a matter of public record. (App. A, p. A-6). An appellate court cannot reasonably conclude that there is no "legitimate concern" as to the ability of a plaintiff to fund a class action with potentially 25,000 class members[14] on the slender fact that

[13]The *Ralston* case in fact involved a smaller class than the present proceeding. *See* n. 12 *supra*.

[14]*See* n. 6 *supra*.

the plaintiff's annual income is $22,744. Here particularly the Tenth Circuit assumed the district court's role. We know nothing, for example, of plaintiff's liabilities and other calls on his income. Plaintiff has to date committed only $4,000 to notice costs, and not one cent to any other litigation expense. First class postage alone for mailing notices would consume $2,500 of this amount. This says nothing of costs of materials, of development and preparation of the class list, of preparing the notices and stuffing envelopes and of publication in respect to absentees who cannot be identified through reasonable effort. More significantly, non-notice costs, *i.e.*, discovery and developing evidence on the merits, will quickly consume the balance of plaintiff's committed resources and much, much more.[15] The plaintiff's resources and his willingness to use those resources are of legitimate concern in any class action. *Eisen* should not be read in such a manner as to confine its application to classes numbering in the millions. In any event, these are matters for the trial courts to resolve, with the assistance, if the trial court feels it necessary, of discovery conducted by the defendant.

C. In its effort to soften the blow of *Eisen* the Tenth Circuit also side-stepped the federal discovery rules. Rule 26(b)(1) provides:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[16]

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[15]As an example, in Ralston v. Volkswagenwerk, A. G., 61 F.R.D. 427 (W.D. Mo. 1973), the trial court determined that $15,000 was insufficient to finance the antitrust class action on behalf of some 18,000 members. In the Court's words, the cost of notice is but the "tip of the iceberg." 61 F.R.D. at 433.

[16]Plaintiff objected to the requested discovery, insofar as it involved agreements or understandings between the plaintiff and his attorneys, on the ground of attorney-client privilege as well as relevance. The Tenth Circuit did not reach or decide the privilege question, however, and only the relevance issues are being raised in this certiorari petition. *See* n. 4 *supra*.

Whether plaintiff is able adequately to represent his class, as Rule 23 requires and as his complaint alleges, is part of the subject matter of any class action. *Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634, 636 (W.D. Pa. 1973). *See* 4 J. MOORE, FEDERAL PRACTICE, ¶ 26.56 [1], at 26-119 (2d ed. 1974). Depositions and other discovery information are commonly relied on by trial courts in determining whether to certify a class. Fact development was very extensive in *Ralston*, and *see, e.g., King v. Sharp*, 63 F.R.D. 60, 66 (N.D. Tex. 1974); *P.D.Q., Inc. v. Nissan Motor Corp. in U.S.A.*, 61 F.R.D. 372, 377 (S.D. Fla. 1973); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 16 F.R. Serv. 2d 1021, 1022 (N.D. Tex. 1972). *See also Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974).

D. The Tenth Circuit used this case as a vehicle to express its views and in a sense re-think *Eisen* without really dealing with what this case is about. The trial court ordered plaintiff to make himself available for discovery of perfectly reasonable scope. The discovery sought is not quantitatively oppressive; the documents requested are few in number, and questions as to the plaintiff's financial resources and willingness to use them can be put in a short period of time. Nor is the discovery qualitatively oppressive. Asking questions concerning the plaintiff's assets and liabilities, and requiring him to submit financial statements and detailed income information, asks no more than does a typical lender when one seeks to borrow money. Surely, in light of the tremendous responsibility to the class borne by the representative plaintiff as well as the huge burden that a class action imposes upon a defendant, this is not too much to ask.

E. A judgment in an action under Rule 23(b)(3) is intended to bind all members of the class who do not request exclusion whether the judgment is favorable or unfavorable. The notice under Rule 23(c)(2) must advise absentee class members of that fact. 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.55, at 23-1160-62, and ¶ 23.60, at 23-1202 (2d ed. 1974).

Thus a defendant in a class suit is entitled to the assurance that the ultimate holding on the merits will stick. If the Tenth Circuit's mandamus order is allowed to stand, and if it turns out that plaintiff cannot or does not adequately represent his class, then the decision may be stripped of *res judicata* effect as to the absentee class members. *Hansberry v. Lee*, 311 U.S. 32, 42-46 (1940); *Gonzales v. Cassidy*, 474 F.2d 67, 74-76 (5th Cir. 1973). This could be disastrous to the defendant and cause additional, unnecessary litigation. There is no reason to put the defendant in such a posture where inadequacy or adequacy of representation can be determined by discovery of facts at an early stage in the lawsuit.

Likewise, the trial courts, as "the guardian of the rights of the absentees," *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973), must be assured that the plaintiff and his attorneys will in fact fairly and adequately represent the class before the matter can properly be certified as a class action. The discovery sought by the defendant is an entirely appropriate method of developing such facts for the trial court's consideration.

F. The Tenth Circuit also determined that the arrangements between plaintiff and his attorneys for the financing of the class action expenses were irrelevant. (App. A, p. A-7). This ignores the realities of the situation. In large class actions, particularly where individual claims are small, the expenses of prosecuting the class action are often advanced initially by the plaintiff's attorneys. *E.g., P.D.Q., Inc. v. Nissan Motor Corp. in U.S.A.*, 61 F.R.D. 372, 378 (S.D. Fla. 1973); *cf., Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 n. 9 (3d Cir. 1973). That is apparently the case in this proceeding.[17] However, the plaintiff must remain "ultimately liable" for the expenses. Canon 5, Disciplinary Rule 5-103(B), A.B.A. and Colorado Codes of Professional Responsibility.

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[17] *See* n. 7 *supra*.

If, however, the plaintiff's financial situation is such that his attorneys are advancing expenses of the lawsuit with no reasonable expectation that he can or will ever repay them, or if indeed the attorneys have represented to their client that they will bear the expenses of the lawsuit, then the plaintiff is not financing the suit. This is contrary to *Eisen*. Examination of the arrangements between the plaintiff and his attorneys is part and parcel of the effort to discover whether the plaintiff is financing the class action.

Moreover, if the attorneys are funding the suit with no reasonable expectations that their client could or would reimburse them, they are guilty of unethical conduct under Disciplinary Rule 5-103(B).[18] The Tenth Circuit suggests that neither trial courts nor defendants have any legitimate concern as to whether class plaintiffs will be able to repay their attorneys, nor with whether the attorneys' behavior is ethical under the CODE OF PROFESSIONAL RESPONSIBILITY. (App. A, pp. A-3, A-7). It is true that unethical conduct by lawyers is normally the subject for grievance committees and not for courts. We submit that this is not the case in a class action context. Courts are guardians of the interests of the absent class members. The MANUAL FOR COMPLEX

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[18]While we do not yet assert unethical behavior on the part of plaintiff's counsel in this case, we do know that plaintiff's counsel estimated that the expenses of this sizeable and complex antitrust litigation would run only in the neighborhood of $2,000 to $4,000. (Sanderson Deposition, pp. 78-79, 108). (Plaintiff's Motion to Stay All Proceedings Pending Appellate Review, p. 2). In his deposition, plaintiff testified that his attorneys had not mentioned anything about another recent class action in the District of Colorado, Oppenlander v. Standard Oil Co. (Indiana), Civil No. C-3413, in which plaintiff's Denver counsel participated and in which expenses for a class of some 6,000 to 7,000 members exceeded $100,000. (Sanderson Deposition, p. 76). Moreover, Speeks & Goldberg, Ltd., counsel for plaintiff in this action, is also counsel for plaintiffs in eight other virtually identical lawsuits filed against Nissan-U.S.A. in eight other states. Thus, we have legitimate concerns to the understandings and arrangements between plaintiff and his counsel as to the extent and payment of expenses in this ligation.

LITIGATION, § 1.47 reflects this judicial concern.[19] Unethical conduct by plaintiffs' attorneys may result in a denial of class status. *See, e.g., Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634, 636-37 (W.D. Pa. 1973). *See also Kline v. Coldwell, Banker & Co., Realtors*, Civil No. 73-2169 (9th Cir. Dec. 20, 1974) (Duniway, J., concurring); *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974). The Tenth Circuit suggests that legal ethics do not call for judical inquiry where "there is no evidence suggesting unethical conduct has surfaced." (App. A, p. A-3, unnumbered footnote). This is an anomalous comment, because it is the decision of the Tenth Circuit itself, not the ruling of the district court, that prevents any such evidence from surfacing.[20]

II. THE DECISION OF THE TENTH CIRCUIT CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUIT COURTS AND NUMEROUS DISTRICT COURTS.

A. Even before *Eisen* at least four federal district courts determined that the plaintiff's ability to pay expenses is relevant to the class action determination: *King v. Sharp*, 63 F.R.D. 60, 66 (N.D. Tex. 1974) (dismissing the class, in part because deposition testimony revealed it to be "highly questionable whether [the plaintiff] can adequately finance the prosecution of a class action"); *Ralston v. Volkswagenwerk, A. G.*, 61 F.R.D. 427, 433-34 (W.D. Mo. 1973) (dismissing the class because the plaintiffs had not shown themselves to be financially able to ade-

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[19]The MANUAL FOR COMPLEX LITIGATION states:

> "The great potential of the class action for speed and efficiency in the administration of justice is attended with equally great potential for unreasonable charges for attorneys' fees and expenses and for improper solicitation of legal representation." Section 1.47

[20]As for the possible indications of unethical conduct in this case, *see* n. 18 *supra*.

quately represent their class); *P.D.Q., Inc. v. Nissan Motor Corp. in U.S.A.*, 61 F.R.D. 372, 377-80 (S.D. Fla. 1973) (cutting two nationwide classes to two separate classes limited to one county each after deposition testimony revealed that the plaintiffs were not financially able to represent larger classes); *Buford v. American Finance Co.*, 333 F.Supp. 1243, 1250, 1252 (N.D. Ga. 1971) (dismissing the class in part because plaintiffs were unable to assume the cost of providing notice).[21] The *King* and *P.D.Q.* courts expressly relied upon deposition evidence for their determinations that the plaintiffs were unable to represent their purported classes. 63 F.R.D. at 66; 61 F.R.D. at 377. The Second Circuit in *Eisen III* was of the same opinion. 479 F.2d 1005, 1015 (2d Cir. 1973) ("If this [giving individual notice to class members] cannot be done, the case must be dismissed as a class action."). One district court has held to the contrary. *Sayre v. Abraham Lincoln Federal Savings & Loan Assn.*, 43 U.S.L.W. 2193 (E.D. Pa. Oct. 11, 1974).

These decisions and that of the Tenth Circuit sharply conflict in their resolution of the key issue in this proceeding: whether the plaintiff's financial ability and willingness to prosecute the class action is relevant to the trial court's class determination.

B. The Tenth Circuit's determination that the arrangements between plaintiff and his attorneys for the financing of the class action expenses were irrelevant also conflicts in principle with other circuit and district courts.

The Tenth Circuit suggests that neither trial courts nor defendants have any legitimate concern as to whether class

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[21] Undoubtedly other district courts have dealt with this subject in making class determinations that have not resulted in published opinions. *E.g., Givens v. W.T. Grant Co.*, Civil No. 14296 (D. Conn. June 15, 1971), *vacated on other grounds*, 457 F.2d 612 (2d Cir. 1972), *vacated and remanded*, 409 U.S. 56 (1972), *modified*, 472 F.2d 1039 (2d Cir. 1972) (holding that if a class plaintiff cannot assume the cost of providing notice the action cannot be maintained as a class action).

plaintiffs in fact will be able to repay their attorneys, nor with whether the attorneys' behavior is ethical under the CODE OF PROFESSIONAL RESPONSIBILITY. (App. A, pp. A-3, A-7). The Ninth Circuit disagrees. In *In re Hotel Telephone Charges,* 500 F.2d 86 (9th Cir. 1974), that court dismissed a class action in part because it believed the action to have been "primarily generated and financially supported by the lawyers." 500 F.2d at 91.[22] Further, in a concurring opinion in *Kline v. Coldwell, Banker & Co., Realtors,* Civil No. 73-2169 (9th Cir. Dec. 20, 1974), published at BNA ANTITRUST & TRADE REGULATION REPORT, No. 696 (Jan. 14, 1975), Judge Duniway expressly raised the possibilities of barratry and solicitation. His concurrence in the dismissal of the class action was largely based on his belief that the case was the creation of and was being maintained by plaintiffs' counsel. ANTITRUST & TRADE REGULATION REPORT, *supra* at D-6.

The Tenth Circuit decision directly conflicts with *Stavrides v. Mellon National Bank & Trust Co.,* 60 F.R.D. 634 (W.D. Pa. 1973). There the court specifically authorized discovery as to arrangements and understandings between plaintiffs and their attorneys respecting the payment and reimbursement of expenses. The court held that counsel must be ethically as well as intellectually competent to represent absent class members in order for the matter to proceed as a class action, citing decisions from other districts where unethical conduct by plaintiffs' counsel resulted in a denial of class status. 60 F.R.D. at 636-38. In *P.D.Q., Inc. v. Nissan Motor Corp. in U.S.A.,* 61 F.R.D. 372 (S.D. Fla. 1973), the court felt it appropriate for courts to look beyond attorneys' expense advances and class plaintiffs' guarantee of reimbursement to determine whether "any attempt [by the attorneys] to collect on that guarantee would be doomed from the start." 61 F.R.D. at 380. *See also Buford v. American Finance Co.,* 333 F.

[22]Plaintiff Sanderson, like many of the named plaintiffs in *Hotel,* is an attorney.

Supp. 1243, 1251 (N.D. Ga. 1971) (listing the danger of solicitation as a reason why courts must carefully scrutinize purported class actions prior to certification).

C. Moreover the Tenth Circuit's decision creates a strange and unique conflict within the same case. The instant litigation is one of nine virtually identical class actions filed in nine separate courts against Nissan-U.S.A., its parent and Datsun dealers located within the different jurisdictions. By order of the Judicial Panel on Multidistrict Litigation of December 10, 1974, these cases were consolidated in the Southern District of Florida for pretrial purposes. These nine cases were also consolidated with two additional, similar class actions against Nissan-U.S.A. already pending in that district, including *P.D.Q., Inc. v. Nissan Motor Corp. in U.S.A.*, cited previously in this Petition. In *P.D.Q.* the district court relied on discovery with respect to the willingness and ability of the Florida and New York class plaintiffs to finance their suits. Judge Atkins found both the class plaintiff's financial resources and his arrangements with his attorneys to be relevant and important to his class determination. 61 F.R.D. at 377-81. Thus the Tenth Circuit's decision in this case barring such discovery has paradoxically created a conflict within the consolidated case. How is the district court in Florida to resolve this problem? Is it to follow the Tenth Circuit's decision as to the Colorado case alone or as to some or all of the other consolidated cases? Those cases were filed, and will be tried, in California, Connecticut, Illinois, Louisiana, Missouri, New Jersey, New Mexico and Texas. This sharp internal conflict in rules governing pretrial matters in the consolidated proceeding can only be resolved by this Court.

III. THE DECISION OF THE TENTH CIRCUIT BARS DISCOVERY CLEARLY RELEVANT TO A MATERIAL ALLEGATION OF THE COMPLAINT AND THEREBY, WITHOUT DUE PROCESS OF LAW, DEPRIVES THE DEFENDANT OF THE FUNDAMENTAL RIGHT TO DEFEND.

It is axiomatic that a defendant is entitled to defend fully and effectively against all the allegations in the complaint against him. An integral part of the right to defend is the right to discover. In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Court emphasized the great importance of discovery rights:

> "But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.
>
> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." (footnotes omitted). 329 U.S. at 507.

Other than the Tenth Circuit decision in the instant case and *Sayre v. Abraham Lincoln Federal Savings & Loan*

Assn., 43 U.S.L.W. 2193 (E.D. Pa. Oct. 11, 1974), we know of no decision barring discovery of facts related to the "adequate representation" allegation in a class action complaint. Rule 23 does not purport to abridge the right to defend. Indeed it could not without violating the Rules Enabling Act, 28 U.S.C. § 2072.

These discovery rights flourish in the system of justice that prevails in the federal courts. This Court in *United States v. Nixon*, 94 S.Ct. 3090 (1974), stated:

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."

These principles are equally applicable in federal civil cases.

In the *Nixon* case the Court also said:

> "Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced." 94 S.Ct. at 3109.

The right to defend effectively and thoroughly in a multimillion dollar antitrust class suit, like the rights of the prosecution and defense discussed in *Nixon*, should also be held to have constitutional dimensions and be protected by the due process guarantees of the fifth amendment, U. S. Const. amend. V.

The decision of the Tenth Circuit permits plaintiff Sanderson to file suit as named plaintiff in a class action al-

legedly representing thousands of people and seeking judgment for millions of dollars and, at the same time, refrain from coming forward with facts which would reveal whether or not he is willing and able to represent the class adequately and fairly. Nissan-U.S.A. is being deprived of factual information necessary for a full defense to the class action allegation, even though the whole case may live or die according to whether a class is certified. This is contrary to the discovery rules, contrary to *Hickman*, and a deprivation of Nissan-U.S.A.'s due process right to defend.

CONCLUSION

The decision of the Tenth Circuit on application for mandamus circumscribing the district court's control of discovery is a grave departure from normal judicial procedure. It is respectfully submitted that this petition for certiorari should be granted.

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February, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1477

JAMES W. SANDERSON, *Petitioner,* v. THE HONORABLE FRED M. WINNER, United States District Judge for the District of Colorado, *Respondent.*	Petition for Writs of Mandamus and Prohibition to the United States District Court for the District of Colorado

Granvil I. Specks of Specks & Goldberg, Ltd., Chicago, Illinois (Richard M. Kranzler of Brenman, Sobol & Baum, Denver, Colorado, on the brief), for Petitioner.

Patrick M. Westfeldt of Holland & Hart, Denver, Colorado (H. L. Arkin of Arkin & Hanlon, Denver, Colorado, R. Brooke Jackson of Holland & Hart, and David Brice Toy and Pamela Ann Rymer of Lillick, McHose, Wheat, Adams & Charles, Los Angeles, California, on the brief), for Respondent.

Before SETH, HOLLOWAY and DOYLE, Circuit Judges.

PER CURIAM.

Plaintiffs seek the issuance of writs of mandamus and prohibition which would direct the district court to vacate

certain discovery orders entered June 25, 1974 and prohibit the court from issuing future discovery orders which would invade the attorney-client privilege relating to financial arrangements with attorneys.

The complaint describes a class action pursuant to Rule 23(b)(3). The allegation is that the various Nissan Corporations named in the complaint in the district court have engaged in an unlawful conspiracy with the named dealerships to violate § 1 of the Sherman Act.

The present conflict results from a notice to take depositions in which plaintiffs were served with a demand for the production of the following documents:

> 2. Current financial statements, income tax returns for the years 1972 and 1973, and any other writings or documents reflecting plaintiffs' ability to finance the expenses that may be involved in this purported class action litigation.
>
> 3. Any agreements plaintiffs have made, collectively or individually, among themselves, with their attorneys of record herein and with any other persons, pertaining to (a) the financing of the costs of this litigation, and (b) the payment of attorneys' fees that might be incurred. Such documents should include, in addition to express written agreements, correspondence and any and all other writings or records reflecting any oral agreements that may have been made or understandings that may have been reached.

Plaintiffs object to both requests on the ground of relevance and, secondly, on the assertion of attorney-client privilege.

Nissan U.S.A. has moved to compel production asserting that the information is relevant for the purpose of determining whether plaintiffs are adequate class representatives and on the ground that plaintiffs have demanded

attorneys' fees, and hence information as to the fee arrangements that plaintiffs have made is necessary.[1]

On June 25, 1974 an extensive hearing was held which included considerable discourse between the court and counsel. The upshot of this was that the district court granted the defendants' requests as set forth above. The court also denied the request of plaintiffs to appeal the ruling pursuant to 28 U.S.C. § 1292(b). The refusal of the court to issue this certificate for interlocutory appeal necessitated the petitions which are before us.

In essence, the court's ruling was that the requested documents were relevant to the issue as to whether a class action was appropriate; that the material was germane to whether the plaintiffs were worthy representatives.

The court also noted that the defendants were entitled to inquire as to whether it was the kind of a class action in which a lawyer seeks to "capture the pot of gold at the end of the rainbow," and that discovery as to all of the details of the arrangement between the lawyers and clients was pertinent in order to make this evaluation and adjudication. The court distinguished between a trial and the inquiry leading to the determination of appropriateness of the class action. It indicated that the latter inquiry allows it to in effect police the lawyers' ethics in connection with the solicitation of business from class members.*

I.
ARE THE EXTRAORDINARY REMEDIES APPROPRIATE?

Our primary concern is with the propriety of the extraordinary writ. Mandamus is, of course, not to be used as a substitute for an appeal. *See* Schlagenhauf v. Holder, 379

[1] This on its face is thin.

*Legal ethics would ordinarily be inquired into in separate proceedings but, in any event, they do not call for an independent inquiry where, as here, there is no evidence suggesting unethical conduct has surfaced.

U.S. 104 (1964). Nevertheless, we have recognized that it may be used in some circumstances to review an interlocutory order. *See* Erie Bank v. United States District Court, Colorado, 362 F.2d 539 (10th Cir. 1966). *See also* Paramount Film Distributing Corp. v. Civic Center Theatre, Inc., 333 F.2d 358, 361 (10th Cir. 1964). The Supreme Court in Will v. United States, 389 U.S. 90 (1967) recognized that mandamus can be used in exceptional circumstances "amounting to a judicial 'usurpation of power' . . ."

We are of the opinion that the writ of mandamus is appropriate in the present circumstances because, as will appear hereinafter, the court's action was within the standards which have been recognized by the cases. We view the trial court's decision as an unwarranted extension of the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 94 S.Ct. 2140 (1974), which extension would limit and curtail Rule 23 in a manner never contemplated.

II.
CONTENTIONS

Plaintiffs maintain that the production of the documents should not be allowed, first, because it invades the attorney-client privilege, secondly, because the substance of the fee arrangements is irrelevant and not calculated to lead the discovery of admissible evidence; and, third, tax returns and other similar financial data are generally irrelevant and compulsory disclosure is not favored. A further reason advanced is that the plaintiffs have agreed to pay the costs of notices to the members of the class.

III.
WHETHER THE MATERIAL SOUGHT WAS RELEVANT

The defendants as well as the district court relied strongly on Eisen v. Carlisle & Jacquelin, *supra.* We read the district court's decision as expanding and projecting the *Eisen*

case. First of all, its facts were wholly different from ours. There, the class was extremely large. 2,250,000 members were identifiable. These were the odd-lot traders on the New York Exchange. The district court held a preliminary hearing on the merits and found that petitioner was more than likely to prevail at trial. It then assessed 90% of the notice costs to the defendants. The Supreme Court condemned the holding of a preliminary hearing on the merits and held also that this did not mitigate the error of assessing 90% of the costs to the defendants. The plaintiffs were held bound to advance the notice costs. There is nothing in the opinion of Mr. Justice Powell in *Eisen* which calls for unlimited inquiry into the financial capacity of plaintiff or which authorizes exposure of the plaintiff's income tax returns together with financial statements, plus documents showing specific financial capacity. Nor are fee arrangements with lawyers a prescribed discovery subject.

Defendants considered it important to ascertain whether plaintiffs were able to pay *all* of the costs in the litigation including extensive depositions. We fail to see relevancy in these inquiries particularly with respect to *in limine* inquiry as to whether a class action is to be allowed. Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation.[2] We recognize that the class action is unique and we see the necessity for the court to be satisfied that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully with the Court's ruling in *Eisen* that due process requires decent notice. But we do not read *Eisen* as creating a presumption against finding a class action. Nor does it approve oppressive discovery as a means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government.

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[2] Federal judges take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich."

We are aware that some lower court decisions have considered the plaintiff's ability to pay as relevant and proper in the present context. *See* P.D.Q. Inc. of Miami v. Nissan Motor Corp. in U.S.A., 61 F.R.D. 372 (S.D. Fla. 1973); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973).[3] However, in both of these cases in which antitrust violations were alleged, the plaintiffs sought to represent a class of all new car purchasers in the United States. Thus, there was legitimate concern of the ability of the plaintiffs to successfully lead a class of this magnitude. Also, the court in *Ralston* was concerned about its ability to manage the class. The mentioned considerations are not present here.

Nor do we see that the defendants have any legitimate concern as to whether plaintiffs will be able to pay their lawyers and will be able to pay a judgment for costs in the event that such a judgment is entered. In this respect we see no difference between the case at bar and any other lawsuit. Defendant will have ample opportunity for discovery under Rule 69 F.R.C.P. if it obtains judgment. *See* Federal Savings & Loan Insur. Corp. v. Krueger, 55 F.R.D. 512 (N.D. Ill. 1972); Gangemi v. Moor, 268 F. Supp. 19 (D. Del. 1967) (Both cases suggest that there is no right to discovery of assets until judgment is obtained).

Finally, defendants know the plaintiff's resources. His salary is a matter of record in the case.

IV.

In view of our ruling that the matters sought at this juncture and in relationship to the inquiry which was then being conducted are irrelevant, we deem it unnecessary to determine whether the documents sought are privileged.

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[3] *But see* to the contrary Sayre v. Abraham Lincoln Fed. Savings & Loan Ass'n., 43 U.S.L.W. 2193 (E.D. Pa. October 10, 1974), holding that such probing is irrelevant. The court considered both the ethics and inadequate representation problems in ruling on discovery similar to that sought here.

The fee arrangement between plaintiffs and attorney may not be privileged. We have found cases which rule that such information is privileged and there are other cases to the contrary. It depends on the circumstances. We need not pursue this in view of our conclusion that it is irrelevant. Neither the courts nor the defendant has legitimate concern as to the propriety of the arrangement under the code of responsibility. As indicated, whether the plaintiff will be able to pay costs is not now relevant. Tax returns are not generally discoverable. It is only when the plaintiff's income is directly in issue. Otherwise there is a public policy against an exposure.

At oral argument plaintiff's lawyer expressed a willingness to reveal the fee arrangement to the court *in camera*. We do not know whether this would be helpful, but if it is deemed desirable by the court and counsel we see no objection to it.

We are not unaware of the fact that class actions are a heavy burden to all of the courts, and especially to the trial courts. We are sympathetic to the problems incident to managing these complex cases. Nevertheless, the rule is viable and must be recognized.

Accordingly, we are of the opinion that a writ of mandamus is proper, and so it is ordered that such a writ issue. It is further directed that the rule to show cause be made absolute.

NOVEMBER TERM - NOVEMBER 26, 1974

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., and The Honorable William E. Doyle, Circuit Judges

JAMES W. SANDERSON, *Petitioner,* vs. THE HONORABLE FRED M. WINNER, United States District Judge for the District of Colorado, *Respondent.*	No. 74-1477 (Petition for Writs of Mandamus and Prohibition to the United States District Court for the District of Colorado)

This cause came on to be heard on petition for writs of mandamus and prohibition from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that a writ of mandamus issue to the United States District Court for the District of Colorado and the Honorable Fred M. Winner, Judge thereof, requiring as follows:

1. The exclusion from the Court's order of June 25, 1974 any requirement for the production of any agreements plaintiff may have made with his attorneys in this action pertaining to (a) the financing of the costs of such litigation, and (b) the payment of attorneys' fees that might be incurred, including, in addition to express written agreements, correspondence and any and all writings or records reflecting any oral agreements that may have been made or understandings that may have been reached pertaining thereto.

2. Vacation of that portion of the June 25, 1974 order requiring the production of documents described in paragraph 2 of the notice to take depositions.

In accordance with the opinion of this Court, it is further directed that the rule to show cause be made absolute.

HOWARD K. PHILLIPS, *Clerk*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 74-W-354

STEPHEN REPLIN, et al., *Plaintiffs,* v. NISSAN MOTOR COMPANY, LTD., NISSAN MOTOR CORPORATION IN U.S.A., et al., *Defendants.*	HEARING ON DISCOVERY MOTIONS

Proceedings before the HONORABLE FRED M. WINNER, Judge, United States District Court for the District of Colorado, beginning at 7:30 a.m., June 25, 1974, in Courtroom E, United States Courthouse, Denver, Colorado.

APPEARANCES:

RICHARD M. KRANZLER, Attorney at Law, appearing on behalf of the plaintiffs.

PATRICK M. WESTFELDT and R. BROOKE JACKSON, Attorneys at Law, appearing on behalf of certain defendants.

PROCEEDINGS

THE COURT: All right, set for hearing is 74-W-354, *Replin v. Nissan Motor Company.* The matter is before the Court on a motion of the defendant Nissan Motor Corporation in U.S.A., first to exclude a co-plaintiff from the taking of a deposition and, secondly, to compel the production of documents.

I have reviewed the motion. I have read the case attached to the motion. I have read in full the Advisory Committee note, which isn't helpful.

I also, for the information of counsel, have a substantial familiarity with the discussions of the Advisory Committee when the Colorado rule was amended. I would like to hear from the plaintiff.

MR. KRANZLER: Yes. If it please the Court, I was handed the motion yesterday when we came into court at one o'clock and I was uncertain as to the purpose for which we were before the Court on that matter.

THE COURT: It was to hear the motion.

MR. KRANZLER: I would like to state first that as to the first part of the motion regarding the exclusion of witnesses, I think I should advise the Court to a certain extent that, as far as today is concerned, is kind of moot.

I think I should explain to the Court that the two plaintiffs Green and Sanderson are, one, Mr. Green is the Regional Director of the Environmental Protection Agency; Mr. Sanderson is the General Counsel for the Environmental Protection Agency, and I've had some bit of difficulty in scheduling them in, due to their jobs, for this deposition. Yesterday morning —

THE COURT: Well, they elected to file the lawsuit. I'm afraid they are going to have to make their jobs fit around their lawsuit.

MR. KRANZLER: There's no question about it, Your Honor. Yesterday morning when we had scheduled Mr. Green's deposition to commence and Mr. Green, as a matter of fact, had been out of the state on his job and had come into the state specifically and blacked out his calendar specifically for yesterday morning for his deposition.

Mr. Sanderson expressed a desire to be present. As for instance, if we were to start depositions this morning, Mr.

Green is tied up with the governors of all of the states in the region who are to be here and wouldn't be available this afternoon. Mr. Sanderson is available this morning. So to a great extent that is rather moot, depending on when the deposition goes.

THE COURT: Is it Mr. Green's theory that this Court is to schedule its proceedings around his schedule or is he going to try to accommodate the Court from time to time?

MR. KRANZLER: Please the Court, he was trying to accommodate the Court. As I advised the Court, when we had him scheduled for yesterday he did this.

THE COURT: But he wouldn't go ahead by himself, as I understand it.

MR. KRANZLER: No, Your Honor, that is not true. Mr. Sanderson expressed a desire to be present and we had advised him that under the Rules he could be present unless good cause could be shown why he shouldn't be present.

As to the second part of the motion of the defendant in this action, we were asked to produce among other things, income tax returns, which we have filed our response to. He asked us to produce any written communications between counsel and the plaintiffs, and which we advised counsel that there are none, and written communications between plaintiffs and the members of the class, which there are none.

THE COURT: There isn't any class?

MR. KRANZLER: Well, I believe there's a class, Your Honor.

THE COURT: I think there is a class action requested.

MR. KRANZLER: Excuse me?

THE COURT: There is a class action requested but there isn't a class yet.

MR. KRANZLER: No, the request was for communication between —

THE COURT: You know, these class actions aren't automatic.

MR. KRANZLER: That's correct, Your Honor. Yes, I'm aware of that. Both of my clients in this action feel quite strongly that the matters of their income tax are their own personal —

THE COURT: What about *Isen* [sic]? What about their ability to pay for the notice?

MR. KRANZLER: Well, I haven't been able to find anything, Your Honor. There's some cases cited by counsel in his motion which I've read and although they discuss — in fact, he cited *Isen* [sic] — and they discuss, I believe, the requirement of the plaintiffs to be willing to pay the cost of the class action, and what the man's income tax return has to do with that —

THE COURT: It might lead to relevant evidence.

MR. KRANZLER: As to his income, Your Honor?

THE COURT: Yes.

MR. KRANZLER: Well, we don't feel that the man's income is a matter of relevancy in this kind of action. His income isn't in question in the suit, Your Honor.

THE COURT: I realize that and, accordingly, if he doesn't want to disclose his income, I think he has a perfect right to refuse to. I think that he can say he does not want to disclose his income.

As a matter of fact, I think you can take the depositions of all the plaintiffs with all of them present if you make a binding election at this time not to bring this as a class action. However, if you wish it brought as a class action, I think that the defendant is entitled to make a separate and an independent inquiry of the plaintiffs apart from each other as to all of the details having to do with the class action; as to how it's going to be financed; as to how notice is going to be given; as to the interest of each of

the plaintiffs in the class action; as to the agreements of each and all of the plaintiffs for the payment of costs and attorneys' fees.

You have your choice, which do you want?

MR. KRANZLER: Well, obviously, Your Honor, we hope it will be a class action.

THE COURT: Very well, is that your choice?

MR. KRANZLER: Yes.

THE COURT: Very well, then you know my views.

Now, in that connection, gentlemen, this is not a matter of first impression with me. I do not have a written opinion in it, but I recommend to counsel they review at least the draft of the order — I don't think they have ever gotten around to a final order — in *Armstrong v. Skyline National Bank*. I have been into this. I have strong views on it. I have these views and we might as well make them a matter of record.

There are three types of class actions. The Rules provide for two. The Rules provide for a B-2 class action and a B-3 class action. There are two types of B-3 class actions in my view. I think *Isen* [sic] is the first step to the Supreme Court of the United States to a recognition of my view. I think it's a view shared by trial judges that the appellate courts are going to reach with a bit more experience.

There's a B-3 class action which is brought for the very proper and laudable purpose of benefiting the members of the class. There is a B-3 class action which is brought to capture the pot of gold at the end of the rainbow for the lawyer. I think that discovery requires that which type of a B-3 action it is be inquired into because I think it is quite relevant to the decision which will have to be made in this case, and has to be made in every B-3 case, as to whether there should or should not be a class action. I think that is one of the factors to be taken into account. At least, it's a factor that I'd take into account.

It is for that reason that I believe full discovery in any area relevant to the class action question be pursued in advance of the class action determination and I'm going to order any discovery relevant to that determination. I think the discovery here sought is relevant to that determination and I expect to have a full inquiry made into that area to permit a proper class action determination.

I believe that the amendment to Rule 26 had as one of its fundamental purposes the right to take the deposition of co-parties separate and apart from each other. As a matter of fact I, as a lawyer, never had any objection to it. Holland and Hart did it to me in the *Rippey* case and I didn't complain a bit. I thought it was funny. And that was before the amendment to the Rule.

After the amendment to the Rule, I don't have the slightest doubt about it. It isn't a trial. It's an inquiry the opposing party is entitled to make to determine the extent of, in this case, the individual plaintiff's knowledge about this lawsuit; the individual plaintiff's background in it; the individual plaintiff's willingness to finance the class action costs which in this case I have no idea how many Datsuns were purchased in the State of Colorado, but I'm sure it was a substantial number.

I'm sure the notice costs are going to be substantial. I think the defendants are entitled to know — and I think the Court is entitled to know — whether the plaintiffs or their lawyers are paying the notice costs. I want to know it and I imagine the defendants want to know it.

In that connection, necessarily, the net worth of the plaintiffs and their ability to pay is relevant. Not only is their net worth and their ability to pay relevant, but their willingness to pay is relevant.

Moreover, certainly from the standpoint of the class members, any agreements made by the individual plaintiffs for reimbursement of any expenses of litigation advanced

by them, any agreements made by the individual plaintiffs with anyone for financing this lawsuit are relevant.

Now, I have expanded somewhat on my views in the hope that we won't have to have a lot of hearings on discovery in this case. I'm not going to assess any attorneys' fees in connection with this hearing, but let it be said that if further hearings are required which, under the comments I have here made, would appear to be unnecessary, attorneys' fees will be assessed against the party who unreasonably causes the hearing.

Let me make a few more comments in that regard. I commend you make a careful study of the Advisory Committee note having to do with the assessment of attorneys' fees. You will note that the language of the Rule was changed from "may" to "shall". And where it was permissive before, it is mandatory now unless the Court expressly finds that the hearing was reasonably necessary.

That isn't a quotation from the Rule, but that's the spirit of the Rule, at least I so read the Advisory Committee note. And I advise you to study it because it's only fair to alert you to my reading of that note, which can get expensive.

Now do you have any questions at all about my views?

MR. KRANZLER: Just for clarification, Your Honor. I believe you stated regarding the right of full disclosure in any area, does the Court then include in that area attorney-client communications?

THE COURT: Absoultely nothing having to do with legal advice, legal opinions. They are subject to the attorney-client privilege and it will be recognized and honored.

What I'm talking about is fee agreements. What I am talking about is, putting it very bluntly, solicitation of business, solicitation of class members. That is not to me, and it never will be to me, privileged. Legal advice is privileged.

I'm sure that you as a competent lawyer know what is and

is not privileged. You are not ordered to disclose any confidential information subject to the attorney-client privilege. But I don't think your fee agreements are attorney-client privilege in a class action or in an action where you seek a class. Does that clarify it?

MR. KRANZLER: Yes, Your Honor.

THE COURT: Do you have any questions?

MR. WESTFELDT: Yes, Your Honor. What I would like to do—and I'm puzzled by Mr. Kranzler's remark about the possible lack of availability of Mr. Green—and I would like to either have it clearly understood in court between Mr. Kranzler and me that we can depose Mr. Green or else I request the Court to order that we can depose Mr. Green.

MR. KRANZLER: There's no question that you can depose Mr. Green. But what I'm saying is that he's tied up this morning but will be available this afternoon. If we go ahead with the deposition, if you want to depose Sanderson this morning, he is available this morning.

MR. WESTFELDT: Mr. Kranzler also told me this morning that Mr. Green would not be available on Wednesday and I had planned to start with Mr. Green at 8:30 or 9:00 this morning.

THE COURT: I got you started early enough this morning that you can.

MR. WESTFELDT: We are ready, Your Honor.

THE COURT: I'm not delaying you.

MR. WESTFELDT: I'd like to start with Mr. Green this morning and continue until it's all over.

THE COURT: Well, if the man has commitments, I guess we have to recognize them, but let's try to get a time that we can get an agreement that he will be there.

MR. WESTFELDT: Can Mr. Green be there tomorrow morning?

MR. KRANZLER: My understanding is that Wednesday he can't. He's available this afternoon.

THE COURT: Well, I don't think it's fair to limit counsel to either an afternoon's deposition or a split deposition.

MR. WESTFELDT: Right.

MR. KRANZLER: I agree with you, Your Honor, but I believe if we start with him this afternoon, we could get finished with him—

MR. WESTFELDT: Not today.

MR. KRANZLER:—this afternoon or tomorrow morning and be done with it.

MR. WESTFELDT: Can we pick up Sanderson and run continuously after we complete the Green deposition?

MR. KRANZLER: My understanding is, yes.

MR. WESTFELDT: Well, I'd really like more than that, Dick, because you and I have worked like the dickens on scheduling this and with the blow-up yesterday, we got nowhere.

THE COURT: Well, here's my suggestion to you gentlemen, if you can work it out in a way that is mutually satisfactory on recognizing that a party has to show up on notice, let's not have any further arguments on it. If you can't work it out satisfactorily, subpoena him and you pick the time.

MR. WESTFELDT: Okay.

THE COURT: And if he doesn't show up when he's subpoenaed, then that's his problem. And if it interferes with his schedule, that puts the burden on the plaintiff to file some sort of a motion in connection with the subpoena. So if you can't work it out between yourselves, why just serve him with a subpoena.

MR. WESTFELDT: We'll do that, Your Honor.

THE COURT: I will say this, if you gentlemen are unable to work it out among yourselves, there's going to have to be an extraordinarily strong showing made why the subpoena should not either be enforced or continued, so just tell Mr. Green if he wants to file lawsuits, he is going to have to litigate just like a businessman. Government officials don't get all these privileges. So work it out.

We will be in recess.

(And these proceedings were concluded at 7:50 a.m., this date.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 74-W-354

STEPHEN REPLIN, et al., *Plaintiffs,* v. NISSAN MOTOR COMPANY, LTD., NISSAN MOTOR CORPORATION IN U.S.A., et al., *Defendants.*	HEARING ON MOTIONS

Proceedings before the HONORABLE FRED M. WINNER, Judge, United States District Court for the District of Colorado, beginning at 2:45 p.m., June 25, 1974, in Courtroom E, United States Courthouse, Denver, Colorado.

APPEARANCES:

RICHARD M. KRANZLER, Attorney at Law, appearing on behalf of the plaintiffs.

PATRICK M. WESTFELDT and R. BROOKE JACKSON, Attonreys [sic] at Law, appearing on behalf of certain defendants.

PROCEEDINGS

THE COURT: All right, this is the third time in two days we are back to the problem of taking or not taking the depositions of two of the plaintiffs in Civil Action No. 74-W-354.

We tried to handle it in a friendly fashion yesterday and we couldn't. We had a hearing this morning and we didn't

get very far. Now there's another emergency in this matter. There is a Motion for Stay pending appellate review. What type of appellate review are we talking about?

MR. KRANZLER: Please the Court, actually this thing is happening so fast—

THE COURT: Well, actually it may be, but tell me what type of appellate review.

MR. KRANZLER: Well, I'm not sure at this point whether or not mandamus or an appeal would lie.

THE COURT: Well, I'm just curious to know how we are going to get it reviewed.

MR. KRANZLER: Well, we feel there's some law on it to the effect that—

THE COURT: If you have in mind certification for an interlocutory appeal, I will rule on it now. I will not certify it now. So if that's what you have in mind, that's out of the way.

MR. KRANZLER: We feel that the orders that the Court entered today regarding the taking of the deposition and the Court—

THE COURT: You're not answering my question. We will get to that in a moment. What type of appellate review are you talking about so I'll know how to rule?

MR. KRANZLER: Number one, Your Honor, we feel that perhaps mandamus may lie in this matter.

THE COURT: Mandamus to what? What do you want to mandamus me to do? I can imagine prohibition, but mandamus escapes me.

MR. KRANZLER: Well, Your Honor, a writ in this matter regarding the matter of the income tax returns of the plaintiffs.

THE COURT: All right, let's get these plaintiffs identified. Who is Mr. Replin?

MR. KRANZLER: Mr. Replin I've informed counsel, I believe the Court, too, that Mr. Replin I have subsequently discovered could not be a member of the proposed class and, therefore, we will—

THE COURT: All right, you move to dismiss as to Mr. Replin.

MR. KRANZLER: We will dismiss as to Mr. Replin.

THE COURT: All right, your Motion to Dismiss as to Mr. Replin is granted. Now, who is Mr. Sanderson?

MR. KRANZLER: I don't quite understand, Your Honor.

THE COURT: What does he do for a living?

MR. KRANZLER: Mr. Sanderson is Acting Regional Director and General Counsel for the Environmental Protection Agency.

THE COURT: Does the Environmental Protection Agency know its Acting Regional Director is bringing an antitrust suit as a private Attorney General.

MR. KRANZLER: As a private attorney?

THE COURT: Private Attorney General.

MR. KRANZLER: I cannot answer that, Your Honor.

THE COURT: I would recommend that he notify them that he is. Who is Mr. Green?

MR. KRANZLER: Mr. Green is the Regional Director of the Environmental Protection Agency, Your Honor.

THE COURT: Does the Environmental Protection Agency know that the Regional Director is bringing a suit as a private antitrust Attorney General in the antitrust field?

MR. KRANZLER: I don't know, Your Honor.

THE COURT: I would recommend that he notify them now.

What don't you want to do? Tell me what you don't want to do.

MR. KRANZLER: We do not want to produce the income tax.

THE COURT: Very well, we will stay that to give you a reasonable opportunity to get appellate review as to producing income tax records.

What else don't you want to do?

MR. KRANZLER: Well, the items contained in my response, Your Honor, that was filed—

THE COURT: Tell me what you don't want to do. I'm going to protect you fully to get appellate review, but you're going to show up for a deposition. What don't you want to do?

MR. KRANZLER: We do not, Your Honor, want to produce the income tax returns, the financial statements.

THE COURT: All right, you don't have to produce that.

MR. KRANZLER: The other items included in that—

THE COURT: Tell me what they are.

MR. KRANZLER:—in that request which was—

MR. WESTFELDT: Two, three and four.

MR. KRANZLER: Current financial statements, income tax returns for the years 1972 and 1973, and any other writings and documents reflecting plaintiffs' ability to finance the expenses that may be involved in this purported class action litigation.

THE COURT: All right, we will stay the order requiring you to produce that until you have an opportunity to obtain appellate review. How much time do you want on that, to get the appellate review—to start it?

MR. KRANZLER: I believe thirty days, Your Honor.

THE COURT: Thirty days for a prohibition? All right, I just want to get along with you and keep you out of this court. We will stay it for thirty days.

MR. KRANZLER: We have to get the record, Your Honor.

THE COURT: All right, we will stay it for thirty days. What else?

MR. KRANZLER: I think they also objected to our response regarding any agreements plaintiffs may have made, collectively or individually, among themselves, with their attorneys of record herein and with any other persons, pertaining to the financing of the costs of the litigation and the payment of attorneys' fees that might be incurred.

THE COURT: All right, we will stay that for thirty days. But don't misunderstand me, unless the Court of Appeals reverses me or prohibits me, you're going to come up with it later, but I want these depositions to proceed.

MR. KRANZLER: I understand, Your Honor.

Also, in addition to express written agreements, correspondence and any and all other writings or records reflecting any oral agreements that may have been made or understandings that may have been reached.

THE COURT: On what?

MR. KRANZLER: Regarding to agreements plaintiffs have made, collectively or individually, among themselves, with their attorneys of record or any other persons. This is all in that one request.

THE COURT: All right, we will stay that.

MR. KRANZLER: And "4" is documents reflecting any and all communications between plaintiffs and any members of the class which plaintiffs purport to represent.

THE COURT: No, that will not be stayed because if they are of a particular nature, that's chamberty [sic] and maintenance. That will not be stayed. I have not the slightest question on that.

MR. KRANZLER: Well, I informed counsel for the defendants, Your Honor, that there were no such documents.

THE COURT: Well, we'll let the witnesses answer.

MR. KRANZLER: All right.

THE COURT: All right. Now what else do you want to get appellate review on?

MR. KRANZLER: There was one other thing, Your Honor. The defendants served a subpoena on Mr. John Green — or purported to serve a subpoena on him — this morning for two thirty this afternoon, and we feel in light of the fact —

THE COURT: All right, we won't hold him in contempt on that. When do you want him?

MR. WESTFELDT: Your Honor, we have another subpoena out for Mr. Sanderson for one thirty tomorrow afternoon. We had previously had an order of depositions —

THE COURT: When do you want Mr. Green?

MR. WESTFELDT: Well, I'd like to do Green before Sanderson.

THE COURT: All right, when do you want him?

MR. WESTFELDT: I'd like Green at one thirty tomorrow afternoon and Sanderson at one thirty the following afternoon.

THE COURT: In view of the fact that Mr. Green and Mr. Sanderson see fit to utilize the offices of this Court to get an order, we will order them to be available tomorrow afternoon at one thirty for the deposition. I've given you everything that you've asked for. Now, will Mr. Green be there?

MR. KRANZLER: I will have to meet with him and talk to him.

THE COURT: If he has matters that he needs relief on, you can tell him he can file a motion, but you'd better tell him it had better be real good grounds. I'm not going to permit these people to impose on this Court. I'm frankly not enchanted with these gentlemen that have time away from their duties that they can bring suits like this. That's up to them and up to their superiors, but I'm not going to permit them to play games with this Court.

MR. KRANZLER: If the Court believes my clients or myself are playing games with the Court, Your Honor, this is not true.

THE COURT: It may or may not be, I'm just saying I'm not going to permit them to.

Now, do you know whether he can be there tomorrow at one thirty?

MR. KRANZLER: At this time, Your Honor, I cannot answer that.

THE COURT: How long will it take you to find out?

MR. KRANZLER: I would have to run him down by telephone and find out.

THE COURT: I would recommend you try. We will leave it this way: If he can't be there at one thirty tomorrow, I would like to know it. We will fix another time when he can be there. I don't want to interfere with the functions of the Environmental Protection Agency, I realize what a vital group that is. I don't want to interfere with any Government agency, but if he sees fit to file private lawsuits, he will have to behave like any other litigant.

MR. KRANZLER: Well, I would like to pose just one other question, Your Honor. Mr. Westfeldt has indicated a desire to take the deposition of one first over the other.

THE COURT: All right, he's got that choice.

MR. KRANZLER: That is correct. But I have two of the plaintiffs, and if one is available —

THE COURT: He is the defendant. You started the lawsuit. He can pick the order in which he wishes to take them, and here we have a situation where one of your plaintiffs is a Government lawyer and the other one of your plaintiffs is a Government administrator. If I were representing the defendants, I'd want to take the administrator in advance of the lawyer.

MR. WESTFELDT: If the Court please, may I ask a couple questions?

THE COURT: Sure.

MR. WESTFELDT: I realize the Court's order staying the production of certain documents.

THE COURT: If I don't, the Court of Appeals will. They are entitled to get appellate review.

MR. WESTFELDT: I understand, I'm not quarreling, Your Honor. But what I want to ask you is, does that mean that at these depositions I cannot inquire into the subjects covered by those documents?

THE COURT: Yes, I'm going to ask you that you stay out of that until the Court of Appeals reviews it, but I assure you if the Court of Appeals doesn't stay me, we'll let you back into it.

MR. WESTFELDT: Okay.

THE COURT: I think you're entitled to, but the Court of Appeals may disagree, and that's why they draw more money than I do.

MR. WESTFELDT: Your Honor, secondly — and I want to be sure that there's no misunderstanding between counsel and me — it is your understanding, isn't it, Mr. Kranzler, that the Stay Order that the Court has entered applies to paragraphs three and four of that Notice to Take Depositions, is that correct?

MR. KRANZLER: Two and three.

MR. WESTFELDT: Two and three, okay, then we are clear on that.

THE COURT: All right.

MR. WESTFELDT: Then, finally, Your Honor, Mr. Arkin is the counsel for the dealer defendants in the case.

THE COURT: Yes.

MR. WESTFELDT: And he has to be out of town on Friday. Since we didn't get started at two thirty — or at nine o'clock Monday or at two thirty today, as we hoped to get

started, it would be more convenient for him if we could start at eight thirty tomorrow morning.

THE COURT: Can that be worked out?

MR. WESTFELDT: And I will take either one first. I want Green first but I will accommodate him and take Sanderson first, but I will have to —

MR. KRANZLER: Well, if you — excuse me, I didn't mean to interrupt you.

MR. WESTFELDT: Your Honor, this notice was filed June 1st, and I don't see any reason why the Court can't make a mandatory order that—ordering whoever it is, to be at eight thirty tomorrow morning.

THE COURT: I could but we might have more pollution.

MR. KRANZLER: Your Honor, I will go right from here to the closest telephone and attempt to contact my clients.

THE COURT: I think this is a hopeless suggestion, but try to work it out between counsel. If you don't, wait around here and we will get to you after this case.

MR. WESTFELDT: Your Honor, we had an agreement. We had an agreement that Mr. Green was going to be there at two thirty, and that agreement was changed.

THE COURT: If you get a new agreement, try to get it reduced to writing or, if worse comes to worst, we will dictate it to Robbie. I'm going to have to recess at three thirty for a ceremony.

MR. WESTFELDT: Okay.

MR. KRANZLER: Thank you, Your Honor.

THE COURT: All right.

(And these proceedings were concluded at 3 p.m., this date.)